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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY CURTIS PALMER, Defendant and Appellant.	E047869 (Super.Ct.No. FVI800051) OPINION

APPEAL from the Superior Court of San Bernardino County. Margaret A. Powers and Gregory S. Tavill, Judges. Affirmed.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Johnny Curtis Palmer guilty of second degree robbery (Pen. Code, § 211)[1] (count 1) with the personal use of a firearm (§ 12022.53, subd. (b)); possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 2); and possession of stolen property (§ 496, subd. (a)) (count 3). The trial court thereafter found true that defendant had suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subd. (a)-(d)); and that defendant was on felony probation (§ 12022.1, subd. (f)) at the time he committed count 1. Defendant was sentenced to a total term of 19 years four months in state prison. Defendant's sole contention on appeal is that the trial court erred in denying his suppression motion. We reject this contention and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

Around 10:32 a.m., on December 28, 2007, San Bernardino County Sheriff's Deputies Antekeier, Struebing, and Lamb responded to a report of an armed robbery at a smoke shop on Highway 18 in Apple Valley. Upon arrival, Deputy Antekeier made contact with the store owner (the victim). The victim informed the deputy that one of her regular customers had stolen money and a carton of Newport cigarettes from her store.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] Because the preliminary hearing and the hearing on the suppression motion under section 1538.5 were held concurrently, and defendant's sole contention on appeal pertains to the denial of his suppression motion, the factual background is taken from the preliminary hearing transcript.

She described the suspect as a Black male adult, about five feet, eight inches tall. She said he was wearing a gray hooded sweatshirt and was armed with a small black handgun. Deputy Antekeier thereafter broadcasted the suspect's description over the police radio.

Deputies Struebing and Lamb thereafter began canvassing the area around the store and nearby apartment complexes. In searching the surrounding area, the deputies noticed a broken chair and money on a brick wall, "directly located north of the smoke shop." A witness testified that while he was working at a nearby apartment complex, he saw a "heavy set" Black male jump over the brick wall, land on the chair, and pick up money that he had dropped. The witness informed the deputies of this occurrence and elaborated that the Black male was wearing blue jeans and a sweatshirt, and ran toward an apartment complex located at 20195 Thunderbird Road. The witness handed Deputy Lamb a dollar bill, which the suspect had dropped. Deputy Struebing broadcasted the information provided by the witness over the police radio.

While Deputies Lamb and Strangle were searching the apartment complex located at 20215 Thunderbird Road, "dispatch advised that an [anonymous] caller had called and said the suspect [they] were looking for was at 20195 Thunderbird Road in Apartment Number 1." Six deputies proceeded to 20195 Thunderbird Road, Apartment No. 1. As the deputies knocked on the front door of the apartment, they heard noises "like people running around inside the apartment." Deputy Strangle informed Deputy Lamb that he saw "one or two subjects moving around and running around in the apartment like they're trying to hide." After about 10 seconds, Donald Palmer (defendant's brother) opened the

front door. He was "brought outside, checked, patted down for any weapons, handcuffed and secured" in a police vehicle. Defendant and another male (Kevin Butler) were found in the apartment, taken outside, handcuffed, and secured.[3]

Because of "[t]he circumstances, the gun, the anonymous caller saying that the suspect . . . ran into Apartment Number 1," "prior history at the address," and "[f]or officer safety," a protective sweep of the apartment was conducted. At the time defendant and the other two individuals were secured, Deputy Lamb did not know whether defendant was the robber. Also, he wanted to make sure there were no other individuals in the apartment. During the protective sweep, Deputy Lamb saw a gray hooded sweatshirt on top of a laundry hamper in a bathroom. Deputy Lamb also saw three unopened packages of Newport cigarettes in three different locations in the apartment and a partially opened gym bag. Without touching the gym bag, Deputy Lamb saw a carton of Newport cigarettes within the partially opened gym bag.

Prior to arriving at the apartment, Deputy Lamb was aware of who lived there: defendant, Kevin Butler, defendant's mother or aunt, and Donald Palmer. Deputy Lamb was also aware that defendant was on parole from the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ),[4] and that possibly defendant's mother or aunt was on parole. Prior to collecting anything and prior to a

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[3] The deputies entered the apartment around 11:10 a.m., approximately 45 minutes after responding to the initial robbery call. The victim identified defendant in an in-field lineup as the person who had robbed her store.

[4] DJJ was formerly known as the California Youth Authority. (Gov. Code, §§ 12838, subd. (a), 12838.3; Welf. & Inst. Code, § 1710, subd. (a).)

further search of the apartment, dispatch confirmed that defendant was on DJJ parole and that Donald Palmer was on felony probation. A further search of the gym bag revealed $74 in ones, "two . . . buck knives," a wallet with defendant's California Identification card, and "three credit cards belonging to a Peggy Howard." Ms. Howard was contacted and stated that the credit cards had been stolen a few days earlier. The total cash found in the apartment was $74; no firearms were found in the apartment.

Defendant testified there was no search and seizure term as a condition of his DJJ parole. He, however, admitted that he was on felony probation for possession of drugs for sale and, as a condition of that probation, he was required to submit to a search at any time by law enforcement.

Following arguments from counsel, the trial court denied defendant's motion to suppress, noting that "the officers were in fresh pursuit of the suspects" and that exigent circumstances existed. The trial court explained: "Having an armed suspect having done the robbery, the officers were able to identify and locate where that suspect was supposed to be. Certainly under those circumstances, they had exigent circumstances for several reasons. One was their own safety. Two was the safety of the residents in the community surrounding that apartment, but also if there was an armed suspect fleeing the police that entered that apartment, they had concern for the innocent person inside the residence as well. So they were well justified in going into the apartment. [¶] As to the probation condition, Term 7, on Mr. Palmer's felony probation, the Court will note that the officer is a 16-year veteran of the police force and on felony probation that comes out of this court, everybody gets search terms. I assume that the officer knew that and think

it's reasonable to come to that conclusion under the circumstances. There's nothing wrong with the officer concluding that those search terms were in place when, in fact, they were in place. So on those grounds, the motion to suppress is denied."

Defendant later filed a renewed motion to suppress evidence pursuant to section 1538.5. The People subsequently filed their opposition. The trial court denied defendant's renewed suppression motion based on the evidence presented at the preliminary hearing. The trial court found there were sufficient exigent circumstances and that the search was justified.

II

DISCUSSION

Defendant contends the trial court erred in denying his suppression motions as there were no exigent circumstances to justify the warrantless entry into defendant's apartment. He further claims that even if there were exigent circumstances, the exigency ceased once the occupants were secured and, therefore, the protective sweep was invalid. He also maintains that the broader search pursuant to his parole/probation status was invalid because the deputies did not know whether he was subject to a search condition.

The standard of appellate review of a trial court's ruling on a motion to suppress is well established. In reviewing the denial of a suppression motion pursuant to section 1538.5, we evaluate the trial court's express or implied factual findings to determine whether they are supported by substantial evidence. But, we exercise our independent judgment to determine whether, on the facts found, defendant's Fourth Amendment rights have been violated. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens "'"to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"'" and to deter future unlawful police conduct. (*People v. Sanders* (2003) 31 Cal.4th 318, 324 (*Sanders*).) "'[T]he "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."'" (*People v. Camacho* (2000) 23 Cal.4th 824, 831.)

1. Exigent Circumstances

A warrantless search by the police is invalid unless it falls within one of the exceptions to the warrant requirement. (*People v. Celis* (2004) 33 Cal.4th 667, 676 (*Celis*).) Hot pursuit of a fleeing felon is a recognized exigent circumstance justifying a warrantless entry into a home. (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 749-750 [104 S.Ct. 2091, 80 L.Ed.2d 732] (*Welsh*), citing *United States v. Santana* (1976) 427 U.S. 38, 42-43 [96 S.Ct. 2406, 49 L.Ed.2d 300] (*Santana*).) This exception to the warrant requirement must be narrowly construed and "requires an 'immediate or continuous pursuit of the [felon] from the scene of a crime.'" (*People v. Williams* (1988) 45 Cal.3d 1268, 1298.) The United States Supreme Court has noted that "'hot pursuit' means some sort of a chase, but it need not be an extended hue and cry 'in and about [the] public streets.'" (*Santana*, at p. 43.) Accordingly, a finding of hot pursuit and exigent circumstances does not necessarily require that the suspect be in view at all times while he or she flees. (See, e.g., *People v. Escudero* (1979) 23 Cal.3d 800, 810 (*Escudero*); *People v. White* (1986) 183 Cal.App.3d 1199, 1203-1204.)

A court may look to additional factors to determine whether exigent circumstances warranted the police action. The California Supreme Court referred to several such factors in a case in which it found that the warrantless arrest of a suspect inside his apartment was lawful. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 121-123, disapproved on another ground in *People v. Bacigalupo* (1993) 6 Cal.4th 457.) Specifically, the court cited: "the gravity of the offense involved; whether the subject of the arrest is reasonably believed to be armed; whether probable cause is clear; whether the suspect is likely to be found on the premises entered; and the likelihood that the suspect will escape if not promptly arrested." (*Id*. at p. 122.)

In *Warden, Maryland Penitentiary v. Hayden* (1967) 387 U.S. 294 [87 S.Ct. 1642, 18 L.Ed.2d 782] (*Hayden*), the United States Supreme Court found exigent circumstances justified the warrantless entry into a home. In that case, two cab drivers, who were alerted by shouts of a "[h]oldup," followed an armed robbery suspect to a house and alerted police. (*Id*. at p. 297.) Police knocked on the door and were admitted by the defendant's wife; however, the court did not rely on consent when it later concluded that the exigencies of the situation justified the police action. (*Id*. at pp. 297-299 & fn. 4.) The Supreme Court explained that the police were informed that an armed robbery had taken place, and that the suspect had entered the house less than five minutes before they reached it. The court further noted that the police had acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons that he had used in the robbery or might use against them. (*Id*. at p. 298.) The court also clarified, "The Fourth Amendment does not require police

officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that [the defendant] was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." (*Id*. at pp. 298-299.)

The deputies in the instant case likewise acted lawfully. With respect to "hot pursuit," in particular, the evidence shows the police acted immediately and swiftly. After learning at 10:32 a.m. that the suspect had fled, the deputies immediately proceeded in the direction indicated and began canvassing the area near the robbery. While investigating, Deputies Struebing and Lamb learned from a witness that a person matching the suspect's description had jumped over a brick wall near the crime and ran toward an apartment complex. The underlying offense was a serious felony in which the suspect was believed to be armed, and there was probable cause to believe he was inside the apartment complex. While Deputies Lamb and Strangle were at 20215 Thunderbird Road, they received information that the suspect was at 20195 Thunderbird Road in apartment No. 1. The deputies thereafter went to the apartment and gave a knock and notice. As they were knocking on the door of the apartment, the deputies heard and saw "one or two subjects moving around and running around in the apartment like they're trying to hide." Unsure of what the occupants were planning, the deputies entered the apartment after one of the occupants, Donald Palmer, opened the front door of the apartment.

All of the activity took place in the immediate vicinity of the armed robbery and within a time span of about 45 minutes. Any delay in obtaining a warrant risked the suspect escaping, the destruction of evidence, and harm to the occupants of the apartment complex and the officers. Exigent circumstances justified entry into the apartment without delay. The delay in seeking an expedited telephonic warrant was not warranted. Under these circumstances, there was substantial risk that defendant might have access to additional weapons and could seek to escape if police were to delay. (Cf. *Hayden*, *supra*, 387 U.S. at pp. 298-299.)

The Fourth Amendment normally requires law enforcement to obtain a search warrant before entering a residence without consent. However, under these circumstances, the individual's right to privacy in his home must give way to "special law enforcement needs" or other considerations without the requirement of a warrant. (*Illinois v. McArthur* (2001) 531 U.S. 326, 330 [121.S.Ct. 946, 148 L.Ed.2d 838].)

Relying on *Welsh, supra,* 466 U.S. 740, defendant asserts that the circumstances here "are not of a true pursuit," because the deputies were not engaged in immediate or continuous pursuit of defendant. We disagree.

In *Welsh,* the driver lost control of his car and came to a stop in a field without causing any injury or property damage. A witness who saw the driver walk away told the officers that the driver was inebriated or sick. The officers went to the driver's nearby house, entered, and arrested him. (*Welsh, supra,* 466 U.S. at pp. 742-743.) The court held there were no exigent circumstances to justify the warrantless arrest because in the State of Wisconsin, driving while intoxicated was a "noncriminal, civil forfeiture offense

for which no imprisonment" was possible, and there was no immediate or continuous pursuit from the scene of the crime. (*Id*. at pp. 753-754.) Thus, the warrantless entry was improper. (*Id*. at p. 754.) The *Welsh* court declined to consider whether the Fourth Amendment imposed an absolute ban on warrantless home arrests for minor offenses, focusing instead on whether the offense was jailable. (*Welsh*, at p. 749, fn. 11.) In contrast to *Welsh*, the case before us involves immediate, continuous pursuit and jailable offenses. The deputies were responding to an armed robbery and were informed the suspect had been seen fleeing into a specific apartment. The deputies entered the apartment following a hot pursuit of an armed robbery suspect.

Exigent circumstances include the objectively reasonable belief that an injured person might be inside the premises *or* that an armed individual inside the premises poses a threat either to law enforcement personnel or to the public. (*Tamborino v. Superior Court* (1986) 41 Cal.3d 919, 924.) In testing the reasonableness of a search—which involves the balancing of the defendant's right to privacy with other compelling interests (*Illinois v. McArthur*, *supra*, 531 U.S. at p. 330)—the court must also consider the possible consequences of a failure to act as promptly as the circumstances warranted. As the court in *People v. Cain* (1989) 216 Cal.App.3d 366, put it, "one must wonder how it would have appeared if someone [inside the residence] had been attacked and injured and was left in that apartment while the officers were explaining the matters to a magistrate." (*Id.* at p. 377.)

In this case, the entry into the apartment was justified by the deputies' reasonable belief that an armed individual might be inside the apartment and that both officer safety

and public safety mandated prompt action. Because the safety of the public and of law enforcement officers investigating a possible crime is of paramount importance, "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." (*Hayden, supra*, 387 U.S. at pp. 298-299.)

Indeed, we note that the instant case is similar to the hot pursuit described by and found constitutionally permissible by our Supreme Court in *Escudero*. In *Escudero*, police were called around 12:40 a.m., by a person who had witnessed a burglary in the house where he was a guest. The suspect fled in his car; the witness followed the suspect in his own car. The suspect abandoned his car and fled on foot. The witness reported the crime to police, gave the police dispatcher a description of the suspect, and provided other identifying information he obtained from the suspect's vehicle registration. (*Escudero, supra*, 23 Cal.3d at pp. 804-805.)

Around 1:00 a.m., approximately 20 minutes after the burglary, police met the witness at the burglary scene. Police obtained additional information from the witness and requested backup to conduct a search of the area. In the interim, the police dispatcher learned from the Department of Motor Vehicles that the vehicle was registered to the suspect, who lived at a ranch in an outlying area. (*Escudero, supra*, 23 Cal.3d at p. 805.) The police dispatcher spoke with the owners of the ranch around 1:25 a.m. The owners verified that the suspect lived in a house on the ranch, that the vehicle he drove (which the witness had followed) was presently parked in front of the suspect's house, and that the suspect matched the description the witness had given to the police. (*Ibid*.)

Approximately one hour after the burglary attempt, six police officers arrived at the ranch where the defendant lived. They entered the defendant's house (after receiving permission to do so from the landlord) and arrested him. (*Id*. at pp. 805-806.)

Our Supreme Court rejected the People's consent theory, but found that fresh pursuit was applicable. (*Escudero*, *supra*, 23 Cal.3d at p. 808.) In so concluding, the court stated: "Throughout the events in question the police were pursuing a man whom they suspected of having broken into an occupied private home in the middle of the night to commit a burglary; this is a serious crime, with an ever-present potential for exploding into violent confrontation. The need to prevent the imminent escape of such an offender is clearly an exigent circumstance within the doctrine here invoked." (*Id*. at pp. 810-811.) We conclude the holding and reasoning of *Escudero* governs here. The record shows that the deputies contacted defendant about 45 minutes after the armed robbery had occurred. During that period, like the police in *Escudero*, the deputies investigated the crime, which included, among other things, interviewing the victim and speaking with a witness who had seen the suspect flee.

On this record, we conclude that the police here were in "hot" or "fresh" pursuit of defendant when they entered his home without a warrant and arrested him, and such conduct by the police conforms to constitutional standards of reasonableness.

2. Protective Sweep

Defendant further argues that even assuming exigent circumstances justified the initial entry into the apartment, that exigency ended after the deputies had secured

defendant and the other two known residents and, therefore, the subsequent protective sweep of the apartment was not justified. We disagree.

"The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articuable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Maryland v. Buie* (1990) 494 U.S. 325, 337 [110 S.Ct. 1093, 108 L.Ed.2d 276] (*Buie*).) "A protective sweep . . . occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." (*Id.* at p. 333.) It allows the arresting officers to take "steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." (*Ibid.*) A protective sweep, aimed at protecting the arresting officers, is a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers or others. (*Id.* at p. 327.) "It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. (*Ibid.*)

The deputies' actions in this case fall within the parameters set forth in *Buie*. As some deputies knocked on defendant's apartment door, other deputies heard and saw "one or two subjects moving around and running around in the apartment like they're trying to hide." After the front door of the apartment was opened, the deputies handcuffed and detained three individuals. Unaware whether one of the detainees was the armed robber and unsure of the location of the gun, the deputies conducted a protective sweep of the apartment for other persons who might pose a danger to the

deputies. Based on the information known to the deputies, including the apparent fast-developing situation inside the apartment, the deputies' protective sweep of the apartment for others who might pose a danger was reasonable. The deputies had reason to believe that the robbery suspect might still be in the apartment because they heard movement immediately before they entered, and they did not know whether any other people were in the apartment. They also knew that the robbery suspect was armed.

A protective sweep addressed the "interest of the officers in taking steps to assure themselves" that the apartment was "not harboring other persons who [we]re dangerous and who could unexpectedly launch an attack." (*Buie, supra*, 494 U.S. at p. 333.) In short, the available facts contributed to a reasonable concern for officer safety. As the United States Supreme Court observed, "unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." (*Ibid*.)

Relying on *Celis, supra*, 33 Cal.4th 667, defendant argues that Deputy Lamb did not have reasonable suspicion to believe that there were others in the apartment other than the three detained. This authority, however, does not aid him.

In *Celis*, the defendant was part of a drug trafficking ring transporting and selling cocaine, which was concealed inside large truck tires. (*Celis, supra*, 33 Cal.4th at pp. 671-673.) Police followed the defendant to his home and witnessed him rolling a truck tire from his house to a waiting coconspirator. (*Id*. at p. 672.) The police detained the defendant in his backyard and, because a detective had observed that the defendant

lived with his wife and "'possibly a male juvenile,'" the police entered the defendant's home "to determine if there was anyone inside who might endanger their safety." (*Ibid*.) They found no one; however, in a wooden box large enough to conceal a person, they found wrapped packages of cocaine. (*Id*. at pp. 672-673.)

Our Supreme Court held that the facts in *Celis* did not create reasonable suspicion of danger to police justifying a protective sweep of the defendant's home. The court reasoned that because officers had not been keeping track of who was in the house, "they had no knowledge of the presence of anyone in [the] defendant's house," and "when they entered the house to conduct a protective sweep, they did so without 'any information as to whether anyone was inside the house.'" (*Celis*, *supra*, 33 Cal.4th at p. 679.) The court further noted that there was no indication that the defendant or his coconspirator were armed when police detained them (*ibid*.), and that police had found no weapons during earlier investigations of the drug trafficking ring. (*Id*. at p. 672.) Considering all these facts together, the court held that the officers had no grounds for reasonable suspicion of the presence of persons who threatened the officers' safety. (*Id*. at pp. 679-680.)

Taken out of context, language in *Celis* could be read to indicate that police may not conduct a protective sweep of a home if they have "no knowledge of the presence of anyone" in that dwelling and no "information as to whether anyone was inside the house." (*Celis*, *supra*, 33 Cal.4th at p. 679.) The court made it clear, however, that "[a] protective sweep of a house for officer safety as described in *Buie*, *does not* require probable cause to believe there is someone posing a danger to the officers in the area to be swept," but "can be justified merely by a *reasonable suspicion* that the area to be

swept harbors a dangerous person." (*Celis*, at p. 678.) As we have discussed, based on the totality of the circumstances in this case and unlike those in *Celis*, the police had grounds for reasonable suspicion that other unknown individuals might be in defendant's apartment with access to a gun. The protective sweep was therefore justified.

3. The Broader Search Based on Defendant's Parole/Probation Status

Defendant also argues that the search beyond the protective sweep pursuant to defendant's parole/probation status was invalid because the deputies did not know whether defendant was subject to a search condition.

In *Sanders, supra*, 31 Cal.4th 318, our Supreme Court held that "an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted." (*Id*. at p. 335.)

The principle announced in *Sanders*, a parolee case, was extended to a probationer in a juvenile proceeding in *In re Jaime P.* (2006) 40 Cal.4th 128, 130. There, our Supreme Court concluded that a juvenile's probationary search condition cannot justify an otherwise illegal search and seizure if the officers conducting the search are then unaware that the juvenile is on probation and subject to the search condition. It reiterated that persons on "probation or parole who are subject to a search condition nonetheless retain some residual expectation of privacy." (*Id*. at p. 136.)

"[A]s *Sanders* explains, the reasonableness of a search must be determined based on the circumstances *known to the officer* when the search is conducted." (*In re Jaime P., supra*, 40 Cal.4th at p. 139.) When an officer knows that a person is on parole,

he or she needs no additional information that the person is subject to a search clause because "[a] search condition for every parolee is now expressly required by statute." (*People v. Middleton* (2005) 131 Cal.App.4th 732, 739.) The same however is not true where probationers are concerned. Some may have search clauses and some may not. Therefore, following *Sanders*, it is imperative that before conducting a probation search, the officer have actual knowledge that the probationer is subject to a search clause. (*People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180, 1195.)

Every parolee, by virtue of section 3067,[5] must be subject to a statutorily required search condition, the scope of which is set forth in the statute. As a result, knowing that a person is on parole is at least presumptive knowledge that the person is subject to such a condition. The same cannot be said of a probationer for whom there is no equivalent statutory requirement. Being a probationer does not automatically, though it may frequently, mean that the person is subject to a search condition. Nor, does it suggest the scope of any such condition. Hence, knowing that a suspect is a probationer is not synonymous with knowing whether that person is subject to a search condition.

Deputy Lamb was aware that defendant was on DJJ parole and that possibly defendant's mother or aunt was on parole. Following the protective sweep and prior to a further search of the apartment, dispatch confirmed that defendant was on DJJ parole and that Donald Palmer was on felony probation. Although defendant testified to the

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[5] Section 3067, subdivision (a), states: "Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause."

contrary, it appears that a search condition is also a general condition of parole for DJJ parolees. (Cal. Code Regs., tit. 15, § 4929, subd. (a)(6).) California Code of Regulations, title 15, section 4929, provides in pertinent part: "The Board shall set conditions of parole at the time parole is granted. . . . [¶] (a) General Conditions of Parole. The following are general conditions of parole: [¶] . . . [¶] (6) You and your residence and any property under your control may be searched without a warrant by a parole agent of the [DJJ], parole agent of the Youthful Offender Parole Board, or any peace officer." The record is unclear whether Deputy Lamb knew that DJJ parolees all had search conditions. Nonetheless, Deputy Lamb's knowledge that defendant was on DJJ parole justified the broader search of the apartment.

For the reasons explained above, we, however, find that the trial court erred in relying on defendant's or Donald Palmer's probationary status to justify the broader search. The trial court stated, "As to the probation condition, Term 7, on [defendant's] felony probation, the Court will note that the officer is a 16-year veteran of the police force and on felony probation that comes out of this court, everybody gets search terms. I assume the officer knew that and think it's reasonable to come to that conclusion under the circumstances. There's nothing wrong with the officer concluding that those search terms were in place when, in fact, they were in place." Even though it may be the case that every felony probation case coming out of that court gets search terms, the trial court's experience was not established by any evidence and was not necessarily the knowledge of the deputy conducting the search. It is the officer's knowledge when the search is conducted that is germane. (*In re Jaime P.*, *supra,* 40 Cal.4th at p. 133.)

Additionally, there was no evidence at the suppression hearing as to the prevalence of search conditions for probationers "out of [that] court" so as to permit an inference as to the likelihood that defendant or his brother had such a condition. Even if search conditions are imposed on the overwhelming majority of probationers, police officers cannot assume that they are present in every case.

Even if we assume the DJJ parole search was invalid, the seizure of the sweatshirt, the Newport cigarettes, and the partially opened gym bag containing the carton of Newport cigarettes and its subsequent search, which uncovered the stolen credit cards and money, was lawful based on the plain view exception. In *Guidi v. Superior Court* (1973) 10 Cal.3d 1, the Supreme Court ruled, ". . . that the police may effect plain view seizures of evidence found in the course of properly circumscribed cursory searches for suspects, free of former constitutional restrictions of such seizures to contraband or stolen property." (*Id*. at p. 14.) The deputies here were conducting a lawful protective sweep when a carton of Newport cigarettes was seen, in plain view, sticking out of the partially open gym bag.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.